

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2143

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2143

MARIANO SALOMON,

Petitioner-Appellant,

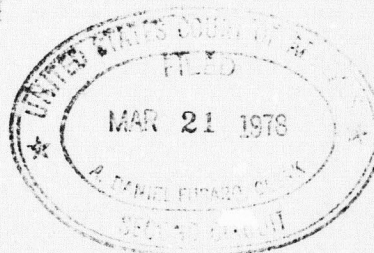
v.

J. EDWIN LA VALLEE, SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLANT
MARIANO SALOMON



DAVID BLACKSTONE
401 Broadway
New York, New York 10013
Tel. 226-6684

Attorney for Petitioner-Appellant
Mariano Salomon

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Petitioner-appellant Mariano Salomon submits
this reply brief in order to respond to a significant
error of law in the brief for the Attorney General of
the State of New York.

POINT I

JUDGE POLLACK WAS INCORRECT IN PLACING
THE BURDEN OF PROVING CONFLICT OF INTEREST
AND PREJUDICE ON PETITIONER IN LIGHT OF
KAPLIN V. BOMBARD, ___ F2d ___ (2d Cir.
1978, Slip Op. 1585, 1595, F.N. 7 (Febru-
uary 15, 1978)).

In his first memorandum (Appendix, Exhibit B), Judge Pollack concluded that the rule of *United States v. De Berry*, 487 F.2d 448 (2d Cir. 1973) as to the shifting of the burden of proof to the government on the question of prejudice when the trial court has failed to conduct an inquiry into conflict is not applicable to the review of state court proceedings on a petition for a habeas writ.

This burden of proof shifts to the prosecution to prove the absence of prejudice where the trial judge has failed to advise the defendants of a potential conflict, see United States v. DeBerry, supra; this shift has been devised by the federal courts of appeals in the exercise of their supervisory power, however, and is not constitutionally compelled, see United States v. Mari, 526 F.2d 117, 120 (2d Cir. 1975) (Oakes, J., concurring). Accordingly, it is not applicable to the review of state court proceedings on a petition for a habeas writ, and petitioner has the burden to demonstrate he was prejudiced by the joint representation.

(Appendix, Exhibit B, p. 2 F.N.)

In his second memorandum (Appendix Exhibit D), Judge Pollack adhered to this position:

"[I]t is the rule that [a petitioner] claiming a conflict by counsel must demonstrate some specific instance of prejudice resulting from the joint representation that would warrant vacature of his conviction." Abraham v. United States, Slip Op. 76-2135/6, 76-2150, 76-2152 (2d Cir., Jan. 21, 1977). Petitioner has again failed to meet that burden.

(Appendix, Exhibit D at p. 2)

Petitioner-appellant's brief was filed on January 10, 1978. I noted there that this circuit had not as yet passed upon the burden of proof issue and argued that the rule of *United States v. De Berry*, *supra*, should apply to habeas corpus review of a state criminal case. (Petit. App. Brief at p. 20) Furthermore, I argued that Salomon should prevail regardless of who had the burden of proof because prejudice in the joint representation was crystalline clear. (Petit. App. Brief at p. 26 and Point I B, pp. 21-25)

On February 15, 1978, this circuit decided *Kaplan v. Bombard*, ___ F2d ___ (2d Cir. 1978), Slip Op. 1585-1600 (February 15, 1978) and resolved the open question by placing the burden of proof on the state of showing no prejudice when the state trial judge has failed to conduct an inquiry into conflict. Footnote 7 at 1595 of *Kaplan* reads:

The defendant bears the burden of showing prejudice where prior to trial the court advised him of the possibility of a conflict and ascertained his willingness to proceed without separate counsel; otherwise the state must show lack of prejudice. *United States v. Carrigan*, *supra*, 543 F.2d at 1056; see also *United States v. Foster*, 469 F.2d 1, 4-5 (1Cir. 1972). (Emphasis supplied.)

See also, Judge Mansfield's concurring opinion in *Kaplan v. Bombard*, *supra*, at 1600:

However, even if we assume that because of the inadequacy of the state judge's inquiry the burden was on the state to show lack of prejudice, see *United States v. Carrigan*, 543 F.2d 1053, 1056 (2d Cir. 1976); *United States v. DeBerry*, 487 F.2d 448, 453-454 n.6 (2d Cir. 1973), I believe that burden was sustained in the present case. Absent a claim or indication of some specific instance of prejudice attributable to the joint representation, the state cannot be required to go any further in proving a negative.

The brief of the New York State Attorney General erroneous claims in Point III at Page 53 that *Kaplan* May be cited for the opposite proposition:

Reliance by petitioner on *DeBarry*, *supra* and *Carrigan*, *supra*, for the proposition that, "if the trial court has failed to conduct an inquiry, the burden of proof on the question of prejudice shifts to the government" is misplaced, and indeed that precise argument was rejected by this Court in *Kaplan*, Slip Op. at 1397 [sic]

Apparently, the Attorney General is referring to Footnote 9 at Slip Op. 1597 of the majority opinion which answers Circuit Judge Mansfield's criticism of the majority's consent analysis. In *Kaplan*, the trial judge did not specifically address Kaplan at the waiver inquiry. Judge Mansfield in his concurring opinion expressed the view that preferred procedure calls for the trial judge to address the defendant personally and to elicit from the defendant a response, and he cited five

Second Circuit decisions - all direct appeals - to support that requirement. Slip Op. at 1599. The majority [Timbers and Dooling] noted in Footnote 9 that a distinction should be made between the court's supervisory power on direct appeals and the court's "far more limited power of reviewing on federal habeas corpus a unanimous decision of the New York Court of Appeals to determine whether error of constitutional dimensions has been committed."

CONCLUSION

For the reasons given above and in the brief for the petitioner appellant Mariano Salomon, the judgment* and order of the United States District Court for the Southern District of New York should be reversed and the case remanded to the District Judge with instructions to issue the writ of habeas corpus.

DATED: New York, New York
March 21, 1978.

Respectfully submitted,

David Blackstone
401 Broadway
New York, New York 10013
Tel. 226-6684

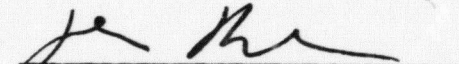
Attorney For Petitioner-Appellant
Mariano Salomon

*A judgment was entered on the instant writ in the District Court on March 13, 1978, and the Court of Appeals record has been supplemented to include the District Court judgment.

AFFIRMATION OF SERVICE

DAVID BLACKSTONE, a member of the Bar of
the State of New York, hereby affirms to the following:

On the 21st day of March, 1978, I caused a
copy of the foregoing reply brief to be served upon
the New York State Attorney General by depositing
same in postage-paid wrappers, properly addressed in
the United States Mail, and that at the time of such
service I knew the address to be the correct address
by prior papers and proceedings heretofore had herein.


DAVID BLACKSTONE

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.
☐ Attorney's Affirmation shows: deponent is

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is
true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

☐ Individual Verification the
the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true.
☐ Corporate Verification the of
a corporation,
in the within action; deponent has read the
and knows the contents thereof; and the same
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is not a party to the action,
is over 18 years of age and resides at
☐ Affidavit of Service By Mail On 19 deponent served the within
upon attorney(s) for in this action, at
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.
☐ Affidavit of Personal Service On 19 at
deponent served the within upon
herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:—Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,
DAVID BLACKSTONE

Attorney for

Office and Post Office Address
401 Broadway
NEW YORK, NEW YORK 10013

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on 19

at M.

Dated,

Yours, etc.,
DAVID BLACKSTONE

Attorney for

Office and Post Office Address
401 Broadway
NEW YORK, NEW YORK 10013

To

Attorney(s) for

Index No. **77-2143**

Year 19

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Respondent-Appellee.

AFFIRMATION OF SERVICE

DAVID BLACKSTONE

Attorney for **MARIANO SALOMON**
Office and Post Office Address, Telephone

401 Broadway
NEW YORK, NEW YORK 10013
Tel. No. 226-6684

To
CLERK OF THE COURT OF APPEALS

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for